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Clean Water Certification Letter

Maine Department of Environmental Protection

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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

January 3rd, 2014

Senator James A. Boyle, Senate Chair
Representative Joan W. Welsh, House Chair
Joint Standing Committee on Environment and Natural Resources
100 State House Station
Augusta, Maine 04333-0100

Re: Notice requirements and opportunities for public comment on Clean Water Certification licensing actions by the Department of Environmental Protection

Dear Senator Boyle, Representative Welsh, and members of the Committee:

In a letter dated April 29, 2013, the Joint Standing Committee on Environment and Natural Resources (Committee) directed the Department of Environmental Protection (Department) to provide responses to five questions concerning the Department's process for receiving public input relating to water quality certifications.

Attached to this letter is a flow chart that describes the water quality certification process, including notice requirements and opportunity for public comment. Also attached to this letter are provisions from Department rule and State statutes that directly address the request of the Committee. Both DEP rules and statutory provisions contain many requirements regarding notification to the public, as well as opportunities for the public to participate in licensing decisions.

There are public notice and opportunity for public comment and participation throughout the licensing process. As is described in more detail below in response to specific questions, the public is notified of an anticipated application submission prior to its receipt by the Department and the public is notified of opportunities for public comment and participation, of substantial changes to the application, drafts of a license and of appeal rights. Not only are these opportunities numerous, but there is more notification and status updates required of clean water certification for hydropower projects than for other applications processed by the Department.

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In response to the 5 questions listed in the April 29 letter, detailed responses follow:

1) How are members of the public notified when the Department receives an application?

2) Who is notified?

- Prior to filing an application (and no more than 30 days prior to filing the application), the applicant must give public notice of its intent to file an application. The notice must be mailed by certified mail or Certificate of Mailing to abutters, and to the municipal office of the municipality(ies) where the project is located. The notice must also be published once in a newspaper circulated in the area where the project is located. DEP Chapter 2, Section 14 provides extensive detail regarding the content of the notification. The notice must include the following information:
 - (1) Name, address and telephone number of the applicant;
 - (2) Citation of the statutes or rules under which the application is being processed;
 - (3) Location of the activity;
 - (4) Summary of the activity;
 - (5) Anticipated date for filing the application with the Department;
 - (6) A statement that requests for the Board of Environmental Protection to assume jurisdiction over the application or requests for a hearing on the application must be submitted to the Department in writing no later than 20 days after the application is accepted as complete for processing;
 - (7) A statement providing the local filing location where the application can be examined;
 - (8) A statement that public comments on the application may be provided to the Department, together with the name and email address of the Department contact person and the mailing address of the Department; and
 - (9) Any other information required by applicable rule or law.
- In addition to this public notice process, a list of all applications accepted for processing is provided to the Board of Environmental Protection and published by the Board on its web site under the “meeting materials” tab.
- In addition to the above-mentioned notice provisions, which are relevant to all license applications processed by the Department, there are specific notice and public participation steps taken when licensing and re-licensing hydroelectric dams. People who express an interest in the licensing matters and all potentially interested persons receive notice and updates throughout the licensing process.

Specifically, 38 MRSA § 640 requires:

Unless otherwise provided in accordance with regulations promulgated by the Federal Energy Regulatory Commission, for all existing hydropower projects located in Maine currently licensed under the Federal Power Act, and for all proposed hydropower projects requiring a license to operate under the Federal Power Act, all state agencies that review, comment on and consult in the proposed studies, plans, terms and conditions in the course of licensing or relicensing these projects, including the Department of Agriculture, Conservation and Forestry, the Governor's Energy Office, the Department of Environmental Protection, the Department of Inland Fisheries and Wildlife and the Department of Marine Resources, shall cooperatively take the following steps to ensure that interested members of the public are informed of, and allowed to participate in, the review and comment process.

1. Publication. *At the commencement of the consultation, review and comment process, the state agencies involved shall publish notification of this fact, informing the public of the issues anticipated to be involved in the licensing or relicensing process, the timetable for processing of the license and the opportunities the public has to comment on and participate in the process. The notice shall be designed to reach readership both statewide and in the vicinity of the hydropower project, including all persons that have contacted the agencies with an interest in this matter and all potentially interested persons.*

2. Written notification of status. *During the entire consultation process and including the filing of the license application under the Federal Power Act, the state agencies shall inform in writing all members of the public that have indicated an interest in the particular licensing process of the status of that process, including all requirements that the agencies may be placing upon the license applicant. That information shall be provided no less than once every 4 months.*

3. Public comment. *State agencies shall provide meaningful opportunities for public comment on the plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license.*

4. Release of public information. *All information submitted to the agencies by the applicants for a license under the Federal Power Act constitutes a public record pursuant to Title 1, section 402, unless such information is otherwise exempted from public disclosure by state law. Release of this information to members of the public is governed by Title 1, section 408-A.*

- 3) How are members of the public notified when revisions are made to an application or a draft decision?
 - 4) How does the Department determine whether a revision requires additional notification to members of the public?
- DEP Chapter 2, Section 14 requires that after an application has been filed, if the Department determines that the applicant submits significant new or additional information or substantially modifies its application at any time after acceptance of the application as complete, the applicant must provide additional notice to abutters and interested persons. The Department may require

additional public notice. Significant expansions of the project or changes to the nature of the project are examples of substantial modification of an application.¹

- In addition to this requirement, the updates required by 38 MRSA § 640 (described above) would be another means the Department uses to notify interested persons of modifications of the application which would be significant enough to require that the Department and consulting agencies address.
- Section 18 of DEP Chapter 2 details the requirements of a draft decision. When the Department issues a draft decision (which it would for a clean water certification for the licensing of a hydroelectric dam), if the decision is substantially revised as a result of comments received, a new draft is made available before issuance of a final decision.

A. Availability of a Draft License Decision. *When an applicant or interested person submits a written request for a draft license decision, that draft decision must be provided to the requester, and made available at the Augusta Office and appropriate regional offices of the Department, at least 5 working days prior to the Commissioner taking final action on the application if it is a Commissioner's decision, or 15 working days before the Board acts on the application if it is a Board decision. In addition, the Department shall give reasonable notice to the applicant, intervenor, and any interested person of the date final action is expected to be taken by the Commissioner or Board on the draft license decision.*

In instances where a hearing has been held, the Department shall provide the draft license decision to the applicant, intervenors and interested persons for review and comment.

B. Comments on a Draft License Decision. *The Department shall accept and may incorporate comments on the draft license decision after it has been made available. If the Commissioner or Board determines that the draft decision should be substantially revised as a result of comments received, a new draft must be made available in accordance with this section. Any person who submits written comments on a draft order will receive a copy of the final order and notice of appeal rights.*

- In addition to the requirements associated with notification of a draft license decision and opportunity to comment, as described above in this letter, 38 MRSA § 640 requires for hydropower projects that notification of status would include any draft license, which the public would have a meaningful opportunity to comment on.

5) Opportunity for Public Comment at each stage of the process and other public comment/participation opportunities of note.

¹ "Minor revision," as defined in DEP Chapter 2, refers to a revision to a license already issued. This is different from the concept of a minor versus substantial revision to an application. However, the concept of a minor revision in either scenario is similar. The following is what constitutes a minor revision to a license: "where the modification significantly decreases or eliminates an environmental impact, does not significantly expand the project, does not change the nature of the project or does not modify any Department findings with respect to any licensing criteria."

- The responses to questions 1-4 detail the opportunity for public comment. As was described in detail by Bill Hinkel in his letter of March 26th, 2013 (attached to this letter, for your convenience), the FERC licensing process, and the corresponding clean water certification process, spans a period of years, and throughout that process, there are many opportunities to comment both in writing and in public meetings. The interagency meetings and cooperation that occur throughout the process ensure that relevant environmental recommendations are not only included in the clean water certification issued by the Department, but also in the license issued by FERC. In addition to the numerous meetings and public participation opportunities afforded to any interested person throughout the licensing process, the public is notified of its appeal rights. Appeals can be taken either to the Board of Environmental Protection or directly to Court.

Department staff take public participation opportunities seriously in all licensing processes, and notification of status is a critical way to ensure the public remains informed throughout the multi-year licensing process for hydroelectric dams. I appreciate the opportunity to describe this process, to assist the Committee's understanding.

If the Committee has any further questions on this matter, feel free to contact the Department.

Sincerely,

Patricia W. Aho, Commissioner
Department of Environmental Protection

Provisions from Department rule and State statutes

38 MRSA § 640 Public participation

Unless otherwise provided in accordance with regulations promulgated by the Federal Energy Regulatory Commission, for all existing hydropower projects located in Maine currently licensed under the Federal Power Act, and for all proposed hydropower projects requiring a license to operate under the Federal Power Act, all state agencies that review, comment on and consult in the proposed studies, plans, terms and conditions in the course of licensing or relicensing these projects, including the Department of Agriculture, Conservation and Forestry, the Governor's Energy Office, the Department of Environmental Protection, the Department of Inland Fisheries and Wildlife and the Department of Marine Resources, shall cooperatively take the following steps to ensure that interested members of the public are informed of, and allowed to participate in, the review and comment process.

1. Publication. At the commencement of the consultation, review and comment process, the state agencies involved shall publish notification of this fact, informing the public of the issues anticipated to be involved in the licensing or relicensing process, the timetable for processing of the license and the opportunities the public has to comment on and participate in the process. The notice shall be designed to reach readership both statewide and in the vicinity of the hydropower project, including all persons that have contacted the agencies with an interest in this matter and all potentially interested persons.

2. Written notification of status. During the entire consultation process and including the filing of the license application under the Federal Power Act, the state agencies shall inform in writing all members of the public that have indicated an interest in the particular licensing process of the status of that process, including all requirements that the agencies may be placing upon the license applicant. That information shall be provided no less than once every 4 months.

3. Public comment. State agencies shall provide meaningful opportunities for public comment on the plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license.

4. Release of public information. All information submitted to the agencies by the applicants for a license under the Federal Power Act constitutes a public record pursuant to Title 1, section 402, unless such information is otherwise exempted from public disclosure by state law. Release of this information to members of the public is governed by Title 1, section 408-A.

Excerpts from Chapter 2: Rule Concerning the Processing Of Applications and Other Administrative Matters.

Section 1(M)

- N. Minor Revision.** "Minor Revision" means a proposal to modify a license previously granted by the Department, where the modification significantly decreases or eliminates an environmental impact, does not significantly expand the project, does not change the nature of the project or does not modify any Department findings with respect to any licensing criteria. This term may be further defined by the Department by rule.

Section 7

7. Hearings

- A. Request for a Hearing on a License Application.** The Department shall provide an opportunity for the applicant or any person to request a hearing with respect to any application. A hearing is an opportunity for an applicant, an appellant, any intervenors, and members of the public to provide testimony under oath and for witnesses to be cross-examined on the substance of their testimony. A request for a hearing on an application must be received by the Department, in writing, no later than 20 days after the application is accepted as complete for processing. The request must indicate the interest of the person filing the request and specify the reasons why a hearing is warranted.
- B. Criteria for Holding Hearings.** Hearings are discretionary unless otherwise provided by law. The Commissioner may conduct a hearing on any application. The Board may conduct a hearing on any application over which it has assumed jurisdiction or on any appeal of a Commissioner license decision. The Department will hold a hearing in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Department in understanding the evidence. When the Board assumes jurisdiction over an application, it will hold a hearing unless it votes otherwise at the time it assumes jurisdiction.
- C. Conduct of Hearings.** Hearings are held in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter 4, and the Department's rules governing licensing hearings. Hearings must be scheduled at the earliest possible date. Upon determining that a hearing will be held, the Commissioner or Board shall also establish a date by which petitions for intervention must be submitted to the Department.

Section 8

8. **Public Meetings on License Applications.** At the Board's or Commissioner's discretion, the Board or Commissioner may schedule and hold public meetings in accordance with Title 38 §345-A(5) on license applications in the geographic area of a proposed project or activity for the purpose of collecting comments that become part of the record in a pending action. Any such meeting must be held during the period when written public comments may be submitted to the Department. Such meetings are not subject to the procedural requirements of the Maine Administrative Procedure Act or the Department's hearing rules. Persons commenting on the application are not under oath and there is no opportunity for cross-examination. The conduct of a public meeting does not change any other obligation the Department has to hold hearings that are mandatory by statute or required after a timely request is filed. The Department shall notify the applicant, interested persons, and the municipal office of the municipality(ies) where the project would be located of public meetings scheduled by the Department. If the project is located in the unorganized or deorganized areas of the state, the Department shall also notify the appropriate county commissioners.

Section 14

14. Public Notice of Applications

- A. **Content and Delivery of the Notice.** Unless exempted in section 14(C) of this rule, within 30 days prior to filing, an applicant shall give public notice of Intent to File a new, renewal, amendment or transfer application. An application that has been previously returned as incomplete pursuant to section 11(B) of this rule must comply with these requirements if the application is not resubmitted within 30 days of the date it was returned to the applicant. The notice must be mailed by certified mail or Certificate of Mailing to abutters, as determined by local tax records or other reliable means, to the municipal office of the municipality(ies) where the project is located and, if the project is located in the unorganized or deorganized areas of the state, to the appropriate county commissioners. The notice must also be published once in a newspaper circulated in the area where the project is located. Copies of the published Notice of Intent to File and a list of abutters to whom notice was provided must be submitted with the application. The notice must include the following information:

- (1) Name, address and telephone number of the applicant;
- (2) Citation of the statutes or rules under which the application is being processed;
- (3) Location of the activity;
- (4) Summary of the activity;
- (5) Anticipated date for filing the application with the Department;

- (6) A statement that requests for the Board of Environmental Protection to assume jurisdiction over the application or requests for a hearing on the application must be submitted to the Department in writing no later than 20 days after the application is accepted as complete for processing;
- (7) A statement providing the local filing location where the application can be examined;
- (8) A statement that public comments on the application may be provided to the Department, together with the name and email address of the Department contact person and the mailing address of the Department; and
- (9) Any other information required by applicable rule or law.

B. Additional Notice. After an application has been filed, if the Department determines that the applicant submits significant new or additional information or substantially modifies its application at any time after acceptance of the application as complete, the applicant shall provide additional notice to abutters and interested persons. The Department may require additional public notice.

If a modification application filed as a minor revision is determined during processing to constitute an amendment, Notice of Intent to File in accordance with this section must be provided. The Department may not act on the amendment application earlier than 20 days after the public notice is published.

If a licensee seeks to amend a license regarding an issue that was the subject of an appeal to the Board, notice of the amendment application must be provided to the prior appellant(s) as if they were abutters, in accordance with section 14(A) of this rule.

C. Exceptions. An applicant for renewal or transfer of an overboard discharge license is not required to publish public notice but must provide notice to abutters and the municipality at the time an application is filed with the Department in the same manner as described in section 14(A) of this rule. An applicant for tax exemption certification is not required to provide notice to abutters, but must comply with other notice requirements of this section.

Section 16

16. Public Comment on Applications. Public comment on applications is allowed during the course of processing the application. Requests for the Board to assume jurisdiction or for a hearing on the application must be received by the Department, in writing, no later than 20 days after the date the application is accepted as complete for processing. The Department shall maintain a list of interested persons for each application.

Section 18

18. Availability of Draft License Decisions.

A. Availability of a Draft License Decision. When an applicant or interested person submits a written request for a draft license decision, that draft decision must be provided to the requester, and made available at the Augusta Office and appropriate regional offices of the Department, at least 5 working days prior to the Commissioner taking final action on the application if it is a Commissioner's decision, or 15 working days before the Board acts on the application if it is a Board decision. In addition, the Department shall give reasonable notice to the applicant, intervenor, and any interested person of the date final action is expected to be taken by the Commissioner or Board on the draft license decision.

In instances where a hearing has been held, the Department shall provide the draft license decision to the applicant, intervenors and interested persons for review and comment.

C. Comments on a Draft License Decision. The Department shall accept and may incorporate comments on the draft license decision after it has been made available. If the Commissioner or Board determines that the draft decision should be substantially revised as a result of comments received, a new draft must be made available in accordance with this section. Any person who submits written comments on a draft order will receive a copy of the final order and notice of appeal rights.

Excerpts from Chapter 450: Administrative Regulation for Hydropower Projects

Section 8(B)

B. Board or Commission Action. Upon receipt of a properly completed application, the Board or Commission shall either:

- (1) Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy;
- (2) Disapprove the proposed project, setting forth in writing the reasons for the disapproval; or
- (3) Schedule a hearing on the proposed project. Any hearing held under this subsection shall follow the notice requirements and procedures for an adjudicatory hearing under Title 5, Chapter 375, subchapter IV. After any hearing is held under this subsection, the Board (or Commission) shall make findings of facts and issue an order approving or disapproving the proposed project, as provided in subsections 1 and 2. (38 M.R.S.A., Sec. 635.)



PAUL R. LEPAGE
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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



PATRICIA W. AHO
COMMISSIONER

March 26, 2013

Senator James A. Boyle, Chair
Representative Joan W. Welsh, Chair
Joint Standing Committee on Environment and Natural Resources

RE: *LD 336 An Act Relating to Clean Water Certification by the Department of Environmental Protection*

Dear Senator Boyle and Representative Welsh and Members of the Committee:

Respectfully, the Department would like to clarify and correct certain statements that were made at the Committee's March 10, 2013 work session on LD 336. Although the Committee voted "ought not to pass" following Representative Shaw's discussion and explanation of the purpose and intent of the bill, the Committee did not receive an accurate representation of the facts, particularly as they relate to issuance of the water quality certification for the Eel Weir Hydropower Project at the outlet of Sebago Lake, and to the DEP process for public participation. Clarification of these issues is important to assure the Committee that the people of the State of Maine have a prominent, important and thoughtfully recognized voice in the water quality certification and DEP licensing processes.

DEP Application Process

38 M.R.S.A. § 344 and Chapter 2 of the Department's rules contains the requirements for public notice and availability of draft commissioner decisions on applications. A process flow chart was provided to the Committee during the work session. The rule requires public notice of intent to file an application with the Department, including notice in a local newspaper, direct mailing to abutters, and notice to the municipality(ies) where the project is located. When an accepted application is substantially modified the applicant shall provide additional notice to interested persons. This provision ensures that applications are not significantly amended without notice to those individuals who have expressed interest in the matter.

Public comment on applications is allowed during the course of processing the application. The window of opportunity for comment stretches from the date the application is accepted as complete for processing until a final commissioner decision is made, without restrictions.

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Any person may request a public hearing on an application or that the Board of Environmental Protection assume jurisdiction over the application within 20 days following an application being accepted as complete for processing. This is explicitly stated in the public notice form. Procedurally, a public hearing and accepting public comments at the beginning of the application processing period, rather than at the end, is most sensible and effective in drafting a decision that contemplates not only the requirements of applicable rules and laws, but also the initial input of the public. Not every application warrants a public hearing. Where a public hearing will assist the Department in understanding the evidence, a public hearing is typically granted when requested. Typically, the Department obtains evidence and technical information needed to process an application without the great expense and resource demands that a public hearing entails. The Department has a very long history of making sound decisions for the environment and people of Maine without a mandate to hold public hearings on every application.

Once the Department has thoroughly evaluated an application, including all technical and environmental information and public comments, a draft decision is made available for public comment. A public hearing at this late stage in the process, as suggested in the Friendly Amendment, has no merit. A provision to allow repeated requests for costly and time-consuming public hearings as a method to provide public comment is unnecessary and ineffective. Public involvement is an integrated component of the current DEP process. If comments result in substantial revisions, a revised draft decision is provided for additional comment.

Once a final commissioner's decision is made, aggrieved persons have the right to file both administrative (Board of Environmental Protection) and judicial (Maine Superior Court) appeals. A fact sheet describing appeal rights is distributed to all interested persons along with the commissioner's final decision. Public participation is encouraged at all stages of the application processing period.

Eel Weir Hydropower Water Quality Certification

The Committee clearly understands that the proposed legislation comes in the wake of a recent water quality certification issued to S.D. Warren for its Eel Weir Hydropower Project at the outlet of Sebago Lake. The Department refutes any argument that the DEP process for public involvement and comment failed or was less than thorough and effective in issuing the water quality certification for the Eel Weir Hydropower Project.

From the project's inception, opportunities for public input were presented and utilized by individuals and groups who followed the process along its nearly 10-year journey at the Department. In fact, the Department held a public meeting regarding Sebago Lake water levels

in February of 1992, ten years before an application for water quality certification was even submitted as part of S.D. Warren's hydropower relicensing by the Federal Energy Regulatory Commission (FERC). Between 1992 and 2011, there were no fewer than 22 notices, meetings, listening sessions and other opportunities presented by the Department and FERC to engage the public and interested persons in the Eel Weir matter. The Department's record for the Eel Weir water quality certification consists of voluminous information, much of that being comments and correspondence from and between the public and the Department. Water quality certification and FERC relicensing is a robust public process.

The Committee heard concerns that there was inadequate public opportunity after S.D. Warren submitted a May 26, 2011 supplement to its 2002 application. The Department has demonstrated to the Committee with information provided at the work session that the supplement to the application was provided by direct mailing from the applicant to an extensive service list of stakeholders. Several stakeholders went on to comment on the supplement. Between submission of the May 2011 supplement and issuance of the final water quality certification in August 2011, the record contains no fewer than 14 separate letters or e-mail correspondence between the Department, the public, natural resource agencies and the applicant regarding the supplement. Moreover, it should be understood that the supplement represents the product of years of public input, comments from natural resource agencies and results of environmental study. The supplement is not a last minute change slipped through without proper public opportunity to review.

On July 26, 2011, after nearly a decade of information gathering and untiring effort to listen to the public on the widely varied recommendations for water quality certification conditions, the Department issued a draft commissioner decision for another opportunity to review and comment before finalizing a decision. The draft was mailed directly to those persons who expressed interest in the matter, and a copy of that distribution list was provided at the work session. In the end, comments were received from just four sources: Portland Water District, the Department of Inland Fisheries and Wildlife, Sebago Lake Marina, the Town of Frye Island, and Douglas Watts. Relatively minor revisions were made the final water quality certification issued on August 30, 2011 as a result of these comments, and these are identified in the information provided immediately following the work session.

Two individuals, who were both heavily involved in and provided numerous comments during the process, filed timely and separate appeals of the August 30, 2011 water quality certification with the Board. The Board held a meeting to hear arguments from the appellants, the applicant and to question Department staff on the conclusions and conditions established in the final water quality certification. Lack of public participation is not an issue that was raised on appeal. Ultimately, the Board unanimously upheld the commissioner's decision finding no procedural,

technical or legal errors in issuance of the water quality certification. One appellant continued on to file with the Maine Superior Court a Petition for Review of the Department's August 30, 2011 decision. That case is pending.

The Department sincerely appreciates the Committee's time to read this letter so that you may speak knowledgably to your constituents and colleagues about the robust and effective public participation process that exists at the Department for processing applications. This process applies to all Department application processes, not just water quality certifications.

I trust this resolves any confusion or concern the Committee may have had following the work session on LD 336, and we welcome any questions that were not adequately addressed herein.

Regards,



Bill Hinkel
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Application for Water Quality Certification

DEP Rule Chapter 2 Process Flow Chart **DRAFT**

